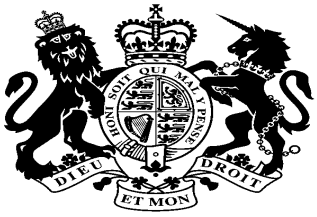

Upper Tribunal
(Immigration and Asylum Chamber)

Macnikowski (applicable policies) [2014] UKUT 00567 (IAC)

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 21 July 2014

Sent on:

……

Before
UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE PERKINS

Between

GREGORZ MACNIKOWSKI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Ms Q Yong instructed by Parker Rhodes Hickmotts Solicitors (Leeds)
For the respondent**:** Mr P Deller, Senior Home Office Presenting Officer

(1) The principle in Abdi [1995] EWCA Civ 27 involves an entitlement to the benefit of a policy that is applicable to the person concerned.

(2) As from 1 April 2009 the applicable policy relating to deportation of EEA nationals who have committed serious offences was that set out in the Criminal Casework Directorate (European Economic Area) Cases ("CCD:EEA"). The preceding policy set out in the Home Office Enforcement Instructions and Guidance (EIGs) Chapter 12.3 ceased to be applicable from that date, notwithstanding that it remained by mistake on the Home Office website for several years thereafter.

(3) *From 15 January 2013 the CCD-EEA policy was in turn revised by modernised guidance entitled: Criminal casework: European Economic Area (EEA) foreign national offender (FNO) cases (CC:EEA)(FNO*).

DECISION AND REASONS

1. On 12 June 2013 the First-tier Tribunal dismissed the appeal brought by the appellant, a 29 year old citizen of Poland (and therefore an EEA national), against a decision made by the respondent on 17 October 2012 to make a deportation order by virtue of section 5(1) of the Immigration Act 1971. On 15 August 2012 the appellant had been convicted of affray and sentenced to 12 months imprisonment. He had five previous convictions, one of which had resulted in a custodial sentence of 21 days, for assault, on 9 June 2008. The Tribunal said it considered that the respondent had shown that pursuant to regulation 21 of the Immigration (European Economic Area) Regulations 2006 (hereafter the 2006 Regulations) there were serious grounds of public policy/public security for making such a decision. Regulation 21(3) identifies the first of two higher levels of protection against deportation for EEA nationals based on five and 10 years' residence respectively; this "baseline" protection for EEA nationals is set out at regulation 19(3)(b).

2. In the course of its determination the First-tier Tribunal rejected an argument advanced by the appellant's representatives that the respondent's decision was not in accordance with the law because it was not based on the Home Office's Enforcement Instructions and Guidance (EIG) Chapter 12.3 which appears to limit deportation action against EEA nationals to persons who "must have been convicted of a serious offence normally attracting a custodial sentence of two years or more …". The First-tier Tribunal reasoned that the EIG Chapter 12.3 was:

> "not exhaustive or conclusive of which convictions will lead to an assessment of serious grounds of pubic policy or public security…The use of the word "normally" is not the same as "must" and this fortifies the Tribunal's view that the Instructions are not exhaustive or conclusive of matters that could lead to such an assessment and thus a finding that the decision was not in accordance with the law".

3. Following a hearing on 12 August 2013 before an Upper Tribunal panel (UTJs Storey and Jordan) the decision of the First-tier Tribunal was set aside for error of law. In essence this decision considered that the First-tier Tribunal had erred by failing to recognise that the EIG policy afforded a discretion which had yet to be exercised. Noting that according to the respondent there were in fact two different sets of policy on the Home Office website at the same time (the EIG policy and another which on its face gave different guidance (which we will identify in a moment)), the Tribunal said that the further question arose as to why the respondent had seemingly failed to follow the EIG policy when it was still on the website.

4. At the close of the above hearing the UT panel put the parties on notice that it wished to receive submissions on the issue of whether as a matter of law the appellant had acquired a right of permanent residence in the five year period between 1 May 2007 (when he arrived in the UK) and 1 May 2012. It made reference to two pending references before the Court of Justice of the European Union, one of these being the Case C-387/12 Onuekwere v SSHD, 16 January 2014. The Court's ruling in that case has now come to hand and, in

light of its clear ruling that periods of imprisonment cannot be taken into account for the purposes of deciding whether an applicant had acquired permanent residence, Ms Yong conceded that the appellant's period of imprisonment in June 2008 prevented him from acquiring permanent residence and that, accordingly, he could only rely on the "baseline" level of protection against deportation as set out in regulation 19(3).

5. At close of the above hearing the UT also directed the appellant to produce an updated witness statement and any other report relating to his current risk of offending. Separately the respondent was directed to furnish particulars of (i) the dates on which EIG Chapter 12.3 went on the Home Office website and when it was removed; (ii) the dates on which the different policy dealing with deportation action against EEA nationals (European Casework Instructions (ECIs) ch 8 Section 3 para 2.2.6) first went on the Home Office website; and (iii) any amendments (and when made) to either (i) or (ii) over the period or periods.

6. In response the appellant produced a supplementary witness statement drawn up on 6 May 2014 and dated 14 July 2014, a psychiatric report by Dr Kajal Patel, Consultant Forensic Psychiatrist dated 20 May 2014, and a skeleton argument. In the witness statement the appellant stated that he continued to be in immigration detention; he had been doing prison work as a cleaner which was a position of trust; he had taken part in art room activities in the education department; he read a lot; he played football and his team had recently won a tournament; he saw the Samaritans in detention regularly; he had given up drinking and smoking which had caused him problems in the past; now he wanted to live like a normal person; he had plans to start a business when released; he was also a chef by profession and also an electrician so whatever happens he would be able to earn a living in the UK and find his own place. For him to go back to Poland would be a readjustment as he lived in the UK so long, he wishes to remain.

7. The psychiatrist's report sets out the appellant's history and notes the progress he has made in custody where he has completed a number of short vocational courses. Reference is made to the appellant having to leave his job at Colnbrook detention centre in the kitchen because of an issue with his manager and an incident in November 2013 with one of the officers which eventually led to his transfer out of Colnbrook. It was also mentioned that the appellant reported some difficulties in his relationship with officers at Dover IRC.

8. The report (which emphasises that it is based on the appellant's own self-report) notes that the appellant was adopted as a child and suffered the loss of his adoptive father some years later; he had no history of mental health problems; he does not have a clear history of drug or alcohol dependence although he had admitted to drinking alcohol at the time of one or more of his offences; the appellant had not been convicted of any offences in Poland.

9. Although there was no OASys report on the appellant Dr Patel addressed the OASys "domains" or "crimogenic factors" in which the appellant reported some difficulties: Relationships; lifestyle and associates; Alcohol and Thinking and Behaviour. Dr Patel said he felt it was very difficult for the appellant to address these factors in prison. If he were released he would be faced with very little support and social contact but would not be in

contact with his anti-social peers. He found the appellant insightful about what he needed to do in future to avoid problems with alcohol.

10. Whilst emphasising that risk assessment is not an exact science, Dr Patel concluded that:

> "taking all the information and ambiguities together, it is my overall view that [the appellant] currently presents a medium risk of reoffending if he were released. The risk may in fact be lower than this, but this is my assessment based on the information I have available".

11. Dr Patel went on to observe that the appellant did not have any convictions for "serious violence", nor had he behaved in a manner that had caused serious harm to anybody in the past. He concluded that: "I would therefore assess his risk of serious harm to others to be low…I do not think [the appellant] presents a particularly increased risk to any subpopulatons such as intimate partners, children, or professionals. "

12. The appellant's skeleton argument made three main points. First, there was nothing to show that at the date of decision the respondent had considered any policy, whether the EIG policy or any other. That in itself rendered the respondent's decision not in accordance with the law. Second, whilst the respondent maintained that the EIG policy had been superseded, her representative had served it on the panel for their consideration at the appeal hearing, appended to other documents. Third, the EIG policy thus fell within the Abdi description of a policy that "was widely published and intended to be acted upon": see Secretary of State for the Home Department v Abdi [1995] EWCA Civ 27 at [23]. Thus it was submitted that the appellant's case fell directly within the circumstances of the Abdi case.

13. As regards whether the respondent had shown that there were grounds of public policy or public security as required by regulation 21(5), the appellant submitted that the appellant had never been sentenced to more than 12 months imprisonment; his early guilty plea went to show that he had genuine remorse for the crime he had committed; he had served his sentence; Dr Patel had assessed his risk of serious harm to others as low; the appellant has been properly rehabilitated within the British system; if he were to be removed there would be an interference with his right to respect for private life with disproportionate consequences.

14. The respondent produced a skeleton argument which explained that the exercise of answering the Tribunal's three questions had proved elusive but she accepted that the "snapshots" furnished on a previous occasion by the appellant taken from the National Archive indicated the continuing presence of the version of EIG 12.3 (which made reference to 2 years) on the external website at the date of decision (in October 2012). Enquiries showed that this had not in fact been removed until April 2013 (and then only as a result of Mr Deller bringing it to the attention of his department). The respondent was able to confirm that this document had been left on the website by mistake.

15. The respondent said she was able to confirm that from 1 April 2009 until early 2013 the external website had exhibited a document entitled Criminal Casework Directorate:

European Economic Area (EEA) Cases (hereafter CCD:EEA Cases) and that this contained the policy that caseworkers had been applying to all cases since that date. This document began with the following Introduction:

> "1.1 This Instruction sets out the action that CCD staff need to take when processing cases for subjects from the EEA.
> 1.2 In a change of policy commencing on 1 April 2009, deportation consideration will be extended to cover EEA Nationals who have been sentenced to 12 months for certain offences covering sex, drugs and violence as listed in Annex B. This policy will apply to all EEA Nationals convicted of an offence on or after 1 April 2009."

16. The respondent stated that this was the policy document that was in force on the date she made a decision on the appellant's case (in October 2012). (We observe in parentheses that we take this clarification to stand as a correction to the description of the policy given in the Tribunal's error of law decision, which referred to Chapter 8 Section 3 para 2.2.6 of the ECIs).

17. The respondent explained that this document was replaced on 15 January 2013 by revised and modernised guidance entitled: Criminal casework: European Economic Area (EEA) foreign national offender (FNO) cases (CC:EEA)(FNO) and, indeed, the version of this modernised guidance produced by Mr Deller was a further updated one; we see this from its page 4 where, under a heading "Changes to this guidance", it is stated that on 23 July 2013 there was a six month review by the modernised guidance team resulting in minor housekeeping changes. On page 5 it is stated that:

> "In cases of EEA FNOs, one of the workflow teams must check the CCD referral form to make sure the FNO meets the internal EEA deportation threshold criteria. The following thresholds apply:
> Custodial sentences of two years (24 months) or over for any offences, or
> Custodial sentences of one year (12) months or over if the offence is related to drugs, sex, violence or other serious criminal activity (for detail of these specific offences, see related link: EEA National 12m offences list).
> While in the majority of cases the two-year threshold will apply for acceptance into CC there may be rare occasions when CC is instructed to accept a case that falls below that threshold, for example on direction from a Minister or the chief executive."

18. The respondent's skeleton argument advanced two main points regarding the co-existence on the external UKBA website at the date of decision of two policies, one applying a two-year custodial sentence threshold (EIG Chapter 12.3), the other applying a one-year threshold (CCD-EEA). The first point was that this co-existence did not bring into play Abdi principles because unlike the situation in Abdi, there was not here a clear indication of what the relevant policy actually said; rather there were "different statements saying different things appear[ing] simultaneously as statements of practice to be followed". Thus the EIG document provided no legitimate basis to suggest that the version more favourable to the appellant had to be followed or indeed fell to be considered at all. The second point was that it was readily apparent from materials elsewhere (including those used by the decision maker) that the policy had changed:

> "Any inappropriate action here was the action of allowing an incorrect policy statement to remain online, not the following of the current and correct policy in reaching the decision now under appeal."

19. Even if these points were not accepted, the respondent submitted that any failure to have regard to the EIG 12.3 document was immaterial to the outcome as the officer concerned was also directed by alternative guidance to the decision actually reached and it was not suggested in Abdi or elsewhere that failure to have regard to an alternative policy statement automatically rendered the ensuing decision "not in accordance with the law"; the outcome of Abdi was clearly affected by the Court's view that it was not certain that the outcome would be the same. Here any further decision would be taken against the same correct policy but with the "old rogue version" now removed from the website. There would be no material difference between the matters now being considered in the appeal and those which would be considered by the respondent.

20. Given the appellant's clearly correct concession that he cannot show he has ever acquired permanent residence and so only qualifies under the "baseline" protection set out in regulation 21(5), it is unnecessary to summarise what the respondent goes on to state in her skeleton argument about the permanent residence issue. As regards regulation 21(5), the respondent points out that the appellant's index offence involved violence and the First-tier Tribunal expressed concerns as to his attempts to address his problems so as to prevent any recurrence of his offending behaviour. This had not been addressed by any material provided on his behalf. The materials available as to propensity to reoffend indicated a risk such that there is a relevant level of danger to the public interest. As the appellant had not in any meaningful way achieved integration into UK society, this was not a situation where any question arose of responsibility for his rehabilitation falling upon the UK. He was not "rehabilitating" to any position in UK society, as on his history he never actually held any such standing.

21. At the hearing the appellant gave brief oral evidence. He emphasised that his job working in the kitchen meant that prison staff entrusted him with responsibility to handle potentially dangerous items such as knives. He had learnt a lot of useful skills whilst in prison which would stand him in good stead in turning his life around. He was now 30 and wanted to live a normal life.

22. Ms Yong amplified her skeleton argument, pointing out that it was incumbent on the respondent to explain why she was departing from a policy of hers that was in the public domain at the date of decision. The refusal letter did not explain this. Indeed the refusal letter shows that no policy was referred to at all. If there had been some behind the scenes reliance on the new policy then surely that should have been put before the First-tier Tribunal, whereas what was put before that tribunal was the EIG policy. That was the policy that the Home Office Presenting Officer put before the First-tier Tribunal as the applicable policy and it was that policy which the First-tier Tribunal had considered. If the First-tier Tribunal could be misled as to the applicable policy, what chance did lay individuals have? What is a member of the public to do in this situation? The appellant's evidence, supported by the psychiatric report, showed that he had faced up to his offences and learnt useful skills in prison. Since arrival in the UK he had worked, he had had a relationship and had a social network of friends. He was more mature now.

23. Mr Deller reiterated the point made in his skeleton that unlike the situation in Abdi, where there was absolutely no doubt about the policy that applied, the present case was characterised by the co-existence of two policy documents. This unfortunate situation arose because of cross-cutting responsibilities between different departments, those with EEA responsibilities and those with Criminal Casework responsibilities. There was now better archiving so this situation would not arise again. In the appellant's case it was sufficiently clear that the respondent had had regard to her CCD-EEA policy; there was nothing to suggest she had looked at the other policy and if she had she would not have followed it as the CCD-EEA policy instructed her to follow the latter.

24. Mr Deller said the co-existence of two different policy documents on the external website was not a happy position, the EIG policy mistakenly staying on for some 4 years, but this could not be a case where the appellant had any kind of legitimate expectation. In any event, even if the decision was flawed through failure to apply the EIG policy, the appellant could not succeed under the correct policy. In addition, if the Upper Tribunal found the decision not in accordance with the law, the respondent would not be debarred from considering that the situation had changed and so considering the appellant under the now, further revised, policy.

25. As regards the EIG policy, Mr Deller said that the word "normally" appears in the wrong place and must have been intended to refer to the normal outcome of conviction for the offence.

26. As regards the issue of whether the respondent was justified in deporting the appellant under regulation 21(5), Mr Deller said he was content to leave that matter to the Tribunal. He accepted that in the past the appellant had engaged with the resident labour market but his criminal behaviour showed he had not integrated into British society or British norms. Article 8 added nothing to his case, as he had little to show by way of private life ties.

27. Asked by the panel whether at the date of decision the respondent was able to make a lawful decision when she had two published policies that were mutually inconsistent, Mr Deller said that if a user went by the external website it would be clear to him or her that the later document superseded the EIG document, although he accepted that the later document did not identify the EIG policy as having been superseded.

OUR ASSESSMENT

28. There are two grounds of appeal before us.

Regulation 21(5) of the 2006 EEA Regulations pursuant to s.84(1)(d) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act)

29. The first ground is that the decision of the respondent to deport the appellant breached the appellant's EEA rights because his deportation was not justified on public policy or public security grounds as required by regulation 21(5) of the 2006 Regulations.

30. We do not find this ground made out. At the date of decision the respondent was entitled to take the view that the appellant had a history of criminal offending which showed escalating levels of seriousness, as reflected in the sentence he received in August 2012 of 12 months for affray. In the light of (i) the NOMS I assessment, which found the appellant a medium risk of harm to the public, (ii) the remarks of the sentencing judge; and (iii) the lack of evidence that the appellant had attended any victim awareness courses to rehabilitate his offending behaviour, it was open to the respondent to find that there was a risk of re-offending and that all the available evidence indicated that he had a propensity to re-offend and that he represented a genuine, present and sufficiently serious threat to the public. The respondent also took into account the appellant's private life ties, which included that he had been living with a sister in the UK and his history of employment. Whilst the appellant had some engagement with the resident labour market in the past, his pattern of criminal behaviour between 2008 and 2012 showed he had not integrated into British society. We agree with Mr Deller that invocation of Article 8 added nothing to the appellant's case, as he had little to show by way of private life ties.

31. By virtue of Schedule 1 to the 2006 Regulations it is necessary for us to consider whether the decision remains a proportionate one consistent with regulation 21(5)-(6) in the light of evidence relating to the appellant's up-to-date circumstances. We accept that the appellant's previous convictions do not in themselves justify his deportation. We are mindful that we must take into account a wide range of considerations relating to the appellant's circumstances, including that he has previously worked in the UK, that he lived in the UK for over a year without any convictions, that - discounting the period of time he has spent in prison - he has integrated socially and culturally into British society to some extent and that there is no evidence that he retains strong ties with Poland. We also accept that whilst in prison (where he remains under Immigration Act powers) he has been able to acquire useful skills through short vocational courses and that he describes himself as wishing to change his ways. However, whilst it may be that he was entrusted with kitchen work at Colnbrook which showed he was trusted with potentially dangerous items such as knives, and whilst it may be that he presently works at a cleaner in IRC Dover, where he is entrusted with potentially dangerous chemicals, it is also clear from the psychiatric report that he had to leave his work in the kitchens at Colnbrook after 6 months because he had an issue with the manager. He had then obtained work in the DVD library but after 6 weeks he was involved in an incident in November 2013 with one of the officers which eventually led to his transfer to Dover. The immigration papers were said by Dr Patel to indicate that he had been racially abusive to an officer in November 2013 although the appellant has no recollection of this. Subsequently when moved to Dover the appellant's application to work in the kitchen was rejected twice. The appellant told Dr Patel that he was not clear why he was rejected, but he reported some difficulties in his relationships with the officers at Dover IRC, as he found their attitudes to be difficult. Whilst we lack fuller particulars, it is clear that the appellant's conduct whilst in prison has caused problems for the authorities. Further, although Dr Patel assessed his risk of serious harm to others to be low, he did not appear to factor in these problems when evaluating the appellant's progress since conviction. Further Dr Patel accepted that:

> "13.11…it is not clear to me what circumstances [the appellant] would face if he were to be released, which makes it harder to estimate the likelihood of him reoffending if he were back in the community. For example [the appellant] would no longer be subject to any form of community supervision (as his sentence has expired); this would potentially have reduced his risk of reoffending".

32. There was therefore no clear basis to assume that if released into the community the appellant would behave in an integrative way. Given that between the time of his latest offence, which represented an escalation in his level of offending, and the present the appellant has been in difficulties with the authorities at both Colnbrook and Dover IRC, we consider that even when due weight is given to certain efforts he has made to address his offending, he still represents a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of society" within the terms of regulation 21(5) of the 2006 Regulations.

The "not in accordance with the law" ground, pursuant to s.84(1)(e) of the 2002 Act

33. The second ground of appeal was that the deportation decision of the respondent was not "in accordance with the law" by virtue of a failure to apply to the appellant's case a relevant policy, namely para 12.3 of the EIG policy. The premise of this ground is that this EIG policy was more favourable to the appellant than the legal criteria set out in regulation 21(5) and that it contained a discretion which caseworkers were instructed to exercise. Applying the principles set out in AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082 it would not be open to any Tribunal to exercise that discretion.

34. In addressing this only surviving ground of appeal, it is convenient to deal first of all with Ms Yong' argument that the appellant is entitled to a "not in accordance with law" decision because the respondent failed to apply any policy, either the old or the new.

35. We would accept that there is nothing that shows that the respondent expressly considered the appellant under any policy, but at the same time we are satisfied that her decision-making was not at odds with the CCD-EEA policy. This states that deportation consideration is now "extended to cover EEA nationals who have been sentenced to 12 months for certain offences covering sex, drugs and violence…" It describes this threshold as only an "initial" criterion. It proceeds to outline a "Stage 2" as follows:

> "3.12 …In considering whether to pursue deportation, the caseworker will consider the length of sentence versus claimed length of residence within the context of the EEA Regulations …This will help determine whether a case is to be pursued. The caseworker will assess the available evidence to support the FNP's claim re how long they have lived in the UK, and whether they have arguably been exercising treaty rights for this period. They will consider whether to pursue further evidence re NI records etc. To assist them to do this caseworkers should consider whether we are pursuing deportation in line with the following grid."

36. The grid that is given lists four headings at the top, three dealing with propensity to re-offend (high risk; medium risk; low/negligible risk) and one dealing with court

recommendation.) The caseworker is required to look at these heads by reference to a left hand column dealing with "sentence/residence".

37. Moving from the terms of the CCD-EEA policy to the respondent's reasons for deciding to deport the appellant, it is sufficiently clear that his 12 months imprisonment was treated as only an initial criterion and that the subsequent criteria relating to length of residence, working history and propensity to re-offend were those which the respondent took into account. In her letter she noted that the appellant had not only been sentenced to 12 months for affray but he had committed a series of offences tracing back to June 2008 and there seemed to be an escalation in the seriousness of his offending; that there was no evidence of residence in accordance with the EEA Regulations for a continuous period of 5 years or 10 years; that he had been assessed as a Multi-Agency Public Protection Arrangements (MAPPA) level 1 nominal as a result of the nature of his offence; and that in completing his NOMS 1 assessment the offender manager had found he posed a "medium risk of harm ". "All the available evidence", the respondent concluded, "indicates that you have a propensity to re-offend and that you represent a genuine, present and sufficiently serious threat to the public to justify your deportation".

38. It remains to consider whether the decision was not in accordance with the law for failing to apply the EIG policy whose terms were more favourable.

39. If at the relevant time the EIG policy had been an applicable policy in the public domain relating to EEA nationals liable to deportation, then there is no doubt in our mind that the decision would have been not in accordance with the law. If it was an applicable policy then it is plain that not only did the respondent not refer to it but that she did not afford the appellant the benefit of its provisions. Although the EIG policy was not in mandatory terms and although it may be, as Mr Deller has argued, that it was poorly drafted, it is clear that it set a two year threshold as a starting point for consideration for deportation. On its face it limited deportation action against EEA nationals to persons who "must have been convicted of a serious offence normally attracting a custodial sentence of two years or more…". At the very least, under the terms of this policy a person liable to deportation could expect that if the custodial sentence in question was less than two years or more, there would have to be some explanation for any departure from the normal approach. Potentially, therefore, this was a policy under which the appellant stood to benefit.

40. It is the respondent's argument, however, that the fact that the EIG had only remained on the website in error and that the caseworkers actually making decisions had no regard to it, meant that it was not in fact an applicable policy.

41. This argument runs the gauntlet of several difficulties.

42. First, Mr Deller concedes that not only did the EIG policy document remain on the website for some 4 years without any warning that it had been superseded in April 2009, but the new policy – the CCD-EEA policy - contained nothing to indicate to the reader that it had superseded the EIG. It is within our judicial knowledge that in recent years new policies appearing on the external website have sometimes contained a clause recording that they cancel or replace a previous one; and indeed the (CC:EEA)(FNO) policy placed

before us (which replaced the CCD:EEA policy from 15 January 2013; see above paragraph 17) contains a box headed "Changes to this Guidance" which stated that on 23 July 2013 there had been a six months review resulting in minor housekeeping changes; so this could have been done. Because it was not done there was no way for any member of the public searching the external website to know that the EIG policy had only been left there by mistake. Nor was there any statement anywhere else on the website explaining that it had been superseded. No doubt the error arose because of divided responsibilities between CCD and EEA national caseworkers, but that furnishes only an explanation, not a justification.

43. Second, the EIG policy was a published policy and the respondent accepts that at least for some period before April 2009 it had been widely acted upon.

44. Third, although Mr Deller sought to suggest (at least at one point) that the EIG policy was essentially a "relic" and that caseworkers could only have made decisions by reference to the new policy, it is apparent that this was not universal knowledge to the generality of Home Office officials. We know that because the Presenting Officer before the First-tier Tribunal actually sought to rely on it and encouraged the Tribunal to rely on it (albeit submitting that it did not assist the appellant because of its wording).

45. Fourth, it is arguable that the co-existence of two policy documents dealing with deportation of EEA nationals who have committed offences on the website at the same time created a lack of transparency and legal certainty, it not being possible for members of the public to know which was the applicable policy.

46. Mr Deller has submitted that any lack of transparency was immaterial because this was not a policy intended to assist a potentially affected person in guiding his conduct. Obviously that is true in relation to whether he could expect to escape the deportation consequence if he had committed offences, but it is less obviously true in relation to whether, having been sentenced to 12 months, such a person should therefore be able to escape deportation by reference to Home Office policy concerning EEA nationals who had worked in the UK previously.

47. In similar vein, Mr Deller has submitted that the EIG policy document was not one on which the appellant could in any sense place reliance. We think he must be right about that, as it seems to us Ms Yong conceded. Indubitably there was no unequivocal assurance, whether by means of an express promise or an established practice, that the Secretary of State would give notice or embark upon consultation before she created or changed this policy: see R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 (also known as R (Niazi) v Secretary of State for the Home Department) at [22]. Policies relating to deportation contained no such assurances. At the same time, quite separately from legitimate expectation, the appellant was arguably entitled to say that there had been a failure by the respondent to abide by the principles of good administration, on the authority of Abdi - by pointing to the fact that the EIG document stated that among the factors that "[c]ase workers would need to consider" was that "A person must have been convicted of a serious offence normally attracting a custodial sentence of two years or more….". In such a context the appellant might be said to be able to pray in aid what was said in R v Department for Education and Employment, ex.p.Begbie [2000] 1 WLR 1115,

113E, where the Court saw "no difficulty with the proposition that in cases where government has made known how it intends to exercise his powers, which affects the public at large it may be held to its word irrespective of whether the [claimant] has been relying specifically upon it. The legitimate expectation in such a case is that government will behave towards its citizens as it says it will".

48. In Lumba (WL) v Secretary of State for the Home Department [2011] UKSC 12 at [20] Lord Dyson noted that there was little dispute concerning three issues:

> "20…. Mr Beloff QC rightly accepts as correct three propositions in relation to a policy. First, it must not be a blanket policy admitting of no possibility of exceptions. Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations."

49. In relation to this second proposition, Lord Dyson went on to observe at [26] that:

> "26.As regards the second proposition accepted by Mr Beloff, a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth *Administrative Law,* 10th ed (2009) p 316. As it is put in *De Smith's Judicial Review,* 6th ed (2007) at para 12-039:
>
> > "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness."
>
> The decision of the Court of Appeal in *R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy. "

50. Having referred at [30] to "the basic public law duty of adherence to published policy" Lord Dyson concluded at [35]:

> "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. "
>
> 36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the*

Home Department [2003] EWHC 2273 (Admin) at para 52 that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute." At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made "in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit". This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?

51. Despite the policy scenario in Lumba being very different, it is arguable that the principle that there is a "correlative right to know what the currently existing policy is so that the individual can make relevant representations in relation to it" has purchase in the instant case. Although, unlike the situation in Lumba, the inconsistency was not between a published and an unpublished policy, but between two published policy documents, it could be said that that only compounds the failure of the respondent to comply with her public law duty of adherence to public policy: if she can be obliged to give effect to her unpublished policy, *a fortiori* she can be obliged to give effect to any policy document which is (or remains) published.

52. Additionally it is arguable that it matters not that the appellant did not know of the existence of this policy (prior to the decision): to echo the words of Pill LJ in R (on the application of Rashid) v Secretary of State for the Home Department [2005] EWCA Civ 744 (although made in relation to an unpublished policy) at [25]: "Whether the claimant knows of the policy is not in the present context relevant. It would be grossly unfair if the court's ability to intervene depended at all upon whether the particular claimant had or had not heard of a policy, especially one unknown to relevant Home Office officials."

53. The reference to certain Home Office officials being unaware of the existence of the policy at issue in Rashid might also be said to have arguable resonance in this case, since, as Ms Yong has highlighted, the Home Office Presenting Officer before the First-tier Tribunal appeared unaware that the policy which he produced to it had been superseded by another, less favourable to the appellant.

54. In light of the above considerations it is superficially attractive to conclude that the appellant was entitled to assume that the EIG policy, being on the external website without any warning anywhere that it had been superseded, would be adhered to, and that, absent its removal or some clear and unambiguous statement that it was no longer the applicable policy, there was a failure of good administration contrary to Abdi principles.

55. Nevertheless, we do not consider that such considerations can or should prevail for two main reasons: first, even though the EIG document was still on the website, it is clear that it had only remained there by mistake; second, it is equally clear that since April 2009 (until 15 January 2013 when the modernised guidance (CC:EEA)(FNO) policy came into force; see above paragraph 17) the only policy that was applied was the CCD-EEA policy.

As a result, it cannot be said that the EIG policy was any longer an applicable policy or one that was intended to be applied. The ratio of Abdi concerns policies that are "intended to be acted upon": see above paragraph 12; as applied to policies, the principle of good administration is about policies that are applicable. It is clear from Lumba [35] (see above paragraph 50) that the public law right to have one's case considered under a policy concerns "whichever policy the executive sees fit to adopt". In the appellant's case there is absolutely nothing to suggest that the respondent intended or saw fit to maintain or apply the EIG policy beyond 1 April 2009 when the CCD-EEA policy came into operation instead.

56. For the above reasons the decision we re-make is:

to dismiss the appeal brought on s.84(1)(d) EEA grounds; and

to dismiss the appeal brought on the s.84(1) (e) ground that "the decision is otherwise not in accordance with the law".

Signed

Date:

Judge of the Upper Tribunal